



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

July 10, 2019

Via electronic mail
Mr. John Kraft
Edgar County Watchdogs
[REDACTED]

Via electronic mail
Mr. James P. Kelly
Attorney for Algonquin Township
Law Offices of Matuszewich & Kelly, LLP
101 North Virginia Street, Suite 150
Crystal Lake, Illinois 60114
jpkelly@mkm-law.com

RE: FOIA Request for Review – 2019 PAC 57781

Dear Mr. Kraft and Mr. Kelly:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2016)). For the reasons explained below, the Public Access Bureau concludes that Algonquin Township (Township) has failed to demonstrate that the information it denied in response to Mr. John Kraft's March 13, 2019, FOIA request is exempt from disclosure under FOIA.

On that date, the Township received Mr. Kraft's request seeking copies of all communications related to the presence of security or police officers at the Township's Board of Trustees meetings. On March 21, 2019, the Township denied the request in its entirety pursuant

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to sections 7(1)(a),¹ 7(1)(b), and 7(1)(m) of FOIA (5 ILCS 140/7(1)(a), (1)(b), (1)(m) (West 2017 Supp.), as amended by Public Act 100-732, effective August 3, 2018). On April 19, 2019, this office received Mr. Kraft's Request for Review disputing this denial.

On April 26, 2019, the Public Access Bureau forwarded a copy of the Request for Review to Mr. James Kelly, counsel for the Township, and asked the Township to provide copies of the withheld records, for this office's confidential review, along with a detailed legal and factual basis for the asserted exemptions. During a telephone conversation on April 30, 2019, with an Assistant Attorney General (AAG) in the Public Access Bureau, Mr. Kelly acknowledged receiving this letter from our office but refused to provide a copy of the responsive record that was withheld for confidential review; he asserted that doing so would waive the attorney-client privilege.² The AAG explained to Mr. Kelly that the Public Access Bureau has previously determined that providing this office with unredacted copies of the records withheld pursuant to section 7(1)(m) does not waive the attorney-client privilege for those records because section 9.5(c) of FOIA (5 ILCS 140/9.5(c) (West 2016)) **requires** a public body to provide this office with the requested records and **requires** a public body to fully cooperate with the Public Access Bureau. *See, e.g.,* Ill. Att'y Gen. PAC Req. Rev. Ltr. 52748, issued October 17, 2018, at 2-5. Later that day, Mr. Kelly sent an e-mail to the AAG again expressing his concerns about providing the withheld record to the Public Access Counselor without waiving the attorney-client privilege and asked that the AAG provide him with a copy of the determination discussed during their previous telephone conversation.³ The relevant determination was e-mailed to Mr. Kelly, which he acknowledged receiving on April 30, 2019.

Having not received a response to the Public Access Bureau's April 26, 2019, request or any further contact from Mr. Kelly, on June 5, 2019, this office forwarded a second copy of the Request for Review to Mr. Kelly and requested that the Township promptly respond

¹Section 7(1)(a) of FOIA exempts from disclosure: "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." The Township, however, did not cite any federal or State law(s) that it asserted prohibited the disclosure of the records responsive to Mr. Kraft's FOIA request.

²Section 7(1)(m) of FOIA exempts from disclosure, in pertinent part: "Communications between a public body and an attorney * * * representing the public body that would not be subject to discovery in litigation, and materials prepared or compiled by or for a public body in anticipation of a criminal, civil or administrative proceeding upon the request of an attorney advising the public body[.]" Communications protected by the attorney-client privilege are within the scope of section 7(1)(m). *See People ex rel. Ulrich v. Stukel*, 294 Ill. App. 3d 193, 201 (1st Dist. 1997). A public body that withholds records under section 7(1)(m) "can meet its burden only by providing some *objective* indicia that the exemption is applicable under the circumstances." (Emphasis in original.) *Illinois Education Ass'n v. Illinois State Board of Education*, 204 Ill. 2d 456, 470 (2003).

³Mr. Kelly's e-mail also provided confidential information to this office concerning the withheld record.

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to Mr. Kraft's Request for Review. The Township did not respond to this office's second request for further information, either.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying. Any public body that asserts that a record is exempt from disclosure has the burden of proving by clear and convincing evidence that it is exempt." 5 ILCS 140/1.2 (West 2016). FOIA provides that "[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Sections 7 and 8.5 of this Act." 5 ILCS 140/3(a) (West 2016). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

The Township has not responded to two written requests for a copy of the responsive record and a written explanation, even though section 9.5(c) of FOIA expressly requires the Township to provide a copy of the record for our confidential review and to otherwise cooperate with this office.⁴ In the absence of the requested information, this office is unable to conclude that the Township has demonstrated by clear and convincing evidence that the withheld record is exempt from disclosure under sections 7(1)(a), 7(1)(b), or 7(1)(m) of FOIA. Accordingly, this office requests that the Township provide Mr. Kraft with a copy of the record responsive to his request, but it may redact "unique identifiers" that constitute "private information" under section 7(1)(b)⁵ of FOIA.

⁴Section 9.5(c) of FOIA provides: "Within 7 business days after receipt of the request for review, the public body shall provide copies of records requested and shall otherwise fully cooperate with the Public Access Counselor." The Township should be mindful of its obligation to comply with this provision in the future.


⁵FOIA defines "private information" as:

unique identifiers, including a person's social security number, driver's license number, employee identification number, biometric identifiers, personal financial information, passwords or other access codes, medical records, home or personal telephone numbers, and personal email addresses. Private information also includes home address and personal license plates, except as otherwise provided by law or when compiled without possibility of attribution to any person. 5 ILCS 140/2(c-5) (West 2016).

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The Public Access Counselor has determined that the resolution of this matter does not require the issuance of a binding opinion. This file is closed. If you have questions, you may contact me by mail at the Chicago address on the bottom of the first page of this letter, by e-mail at sbarnaby@atg.state.il.us, or by phone at (312) 550-4480. Thank you.

Very truly yours,


SHANNON BARNABY
Assistant Attorney General
Public Access Bureau

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